IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 62 of 2006
With
CIVIL APPLICATION No. 137 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAGHAVJIBHAI NARSINHBHAI PATEL & 4 - Appellant(s)

Versus

AMROLI ANJUMAN FUND THR' TRUSTEE & 4 - Respondent(s)

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Appearance :
MR MIHIR JOSHI WITH MR MI MERCHANT for Appellant(s) : 1 - 5.
None for Respondent(s) : 1,3 - 5.
MR SN SHELAT WITH MR MITUL K SHELAT for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 17/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 13.12.2005 of the learned Single Judge dismissing the petition of the appellants herein challenging the interlocutory order dated 7.9.2005 passed by the Gujarat Revenue Tribunal in Appeal (AS) No.3 of 2005 refusing to grant interim relief prayed for by the appellants herein.

2. Amroli Anjuman Fund - a public religious charitable trust – respondent No.1 herein made an application before the Joint Commissioner, Surat seeking permission under Section 36 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as “the Act” for short) to sell the land admeasuring 8093 sq.mtrs., situated at village Chhaprabhata in Choryasi Taluka of Surat district. Respondent No.1 – Trust (hereinafter referred as “the vendor trust”) stated that the land was not in use for many years, because, the land was for running Agiari and was mainly Dokhma land i.e., it was to be used for the last rituals for the members of the Parsi community, but the number of Parsi families was dwindling and only three Parsi families remained in the village. With good road connectivity with Surat and faster means of transportation and communication, if at all when any member of the above three families of Parsi community residing in the village was required to take a dead body, the same could be easily taken to the Dokhma at Surat. It was also stated that on account of non-use of the property, encroachments were taking place and it was in the interest of the

Trust to sell the land. The vendor-Trust also indicated that they had agreed to sell the land for the price of Rs.42,11,111/- to respondent No.2 – Bochasanvasi Shri Akshar Purushottam Swaminarayan Sanstha – (hereinafter referred to as "the Purchaser-Trust") a registered Public Charitable Trust, which was carrying on a large number of charitable and religious activities.

3. The Joint Charity Commissioner, Surat got the notice dated 7.4.2004 published in a widely circulated Gujarati newspaper published from Surat for inviting offers. The advertisement also mentioned that the purchaser Trust (i.e., respondent No.2 herein) wanted to purchase the land for charitable activities like health and education. The public notice also invited the objections, if any, against the sale proposed to be made by the vendor – Trust to the purchaser Trust. It was also indicated in the public notice that the question whether the land in question could be sold to any private party would also be considered at the hearing.

4. In response to the above public notice, the appellant herein, claiming to be a body of individuals, offered to purchase the property for Rs.1 crore. At the hearing before the Joint Charity Commissioner, the vendor–Trust submitted that the vendor–Trust did not desire to consider the offer of Rs.1 crore made by the appellant herein, because, the appellants herein did not desire to purchase the land

for any public charitable purposes, but only for commercial activities and, therefore, the Trustees of the vendor–Trust were not willing to sell the property in question to the appellants herein. The Trustees of the vendor–Trust stated that they wanted to accept the offer of Rs. 42,11,111/- made by respondent No.2 herein (respondent No.3 before the learned Charity Commissioner) on the ground that the purchaser–Trust is a charitable trust running several religious and charitable institutions like educational institutions and hospitals. Before the Joint Charity Commissioner, affidavits are also stated to have been filed by the members of the Parsi community supporting the stand of the vendor–Trust for selling the property to the purchaser Trust (respondent No.2 herein). Joint Charity Commissioner, by his order dated 30.06.2005, permitted the Vendor–Trust to sell the property to respondent No.2 herein (the purchaser–Trust) for an amount of Rs.42,11,111/-. On the basis of the said permission, the trustees of the vendor–Trust executed the sale deed on 2.7.2005 and presented the same for registration on 5.7.2005.

5. The above order of the Joint Charity Commissioner has been challenged in two appeals, being Appeal (AS)Nos. and 4 of 2005. Appeal (AS) No.3 of 2005 is filed by the present appellants, whereas Appeal (AS)No.4 of 2005 is filed by another bidder who did not send the demand draft of the requisite amount i.e., of Rs.15,00,000/- along with his offer.

For all practical purposes, therefore, Appeal (AS) No.4 of 2005 is filed by the person who had not submitted any valid offer in response to the public notice. Hence, only two offers were required to be considered by the Joint Charity Commissioner and by the Gujarat Revenue Tribunal in appeal. The appellants herein submitted an application for interim stay to restrain the vendor–Trust and the purchaser–Trust from acting upon the order of the Joint Charity Commissioner mainly contending that acceptance of the offer of the purchaser–Trust has caused the loss of Rs.58 lacs to the vendor–Trust. It was also contended that while considering the question of granting sanction under Section 36 of the Act, the intention of the purchaser is immaterial and that the Charity Commissioner is only concerned with the question of ensuring that the vendor–Trust gets the maximum consideration for its property. It was also contended that the permission granted by the Charity Commissioner was against the principle of Cypres under Section 55 of the Act and also in violation of the provisions of Section 10 of the Transfer of Property Act. After hearing the learned advocates for the parties, the Tribunal rejected the application by order dated 7.9.2005. The appellants, therefore, challenged the said order in a petition which has been dismissed by the learned Single Judge by the judgment and order dated 13.12.2005 which is under challenge in this appeal.

6. Mr.Mihir Joshi, learned counsel for the

appellants has submitted as under :

6.1. Dismissal of the application for interim relief by the Tribunal and confirmation of the said order by the learned Single Judge has virtually resulted into dismissal of the appeal pending before the Tribunal.

6.2. The object of the vendor–Trust was making Diva and maintaining Agiari at Amroli Dokhma and that in view of the dwindling population of the Parsi community in the village, once it was realized that the vendor–Trust was not in a position to achieve the original objects, the vendor–Trust was only required to obtain maximum value for its property and thereafter to apply before the Charity Commissioner under Section 55 of the Act for applying the funds to other objects under the doctrine of cypres. However, at the stage of considering the application under Section 36, the Joint Charity Commissioner was not concerned with the considerations relevant for deciding the application under Section 55 of the Act which are unnecessarily imported into the order of the Joint Charity Commissioner and also in the order of the Tribunal and the learned Single Judge.

6.3. At the stage of considering application u/s 36, the intention of the trustees of the vendor–Trust or the intention of the trustees of the purchaser trust is not relevant. What is relevant is the intention of the settlor of the vendor–Trust and

how he would have liked to apply the sale proceeds after obtaining the maximum price upon the sale of the property in question. How the trustees of the purchaser–Trust are going to use the property in question cannot be relevant while determining the price at which the vendor–Trust should be permitted to sell the property.

6.4. Reliance has been placed on the decisions reported in AIR 1954 SC 388 (394), AIR 1965 SC 1611, AIR 1985 Delhi 318, 1993(1) GLH 473 and 1999(1) GLH 854.

6.5. Even if the considerations relevant for deciding an application under Section 55 could be imported during the exercise of the powers under Section 36, the jurisdiction to take final decision on the application under Section 55 is vested in the Court and not with the Charity Commissioner and, therefore, also the impugned decision of the Charity Commissioner is without jurisdiction.

7. On the other hand, Mr.S.N.Shelat, learned counsel for respondent No.2 – Trust (purchaser–Trust) appearing on caveat, has opposed the appeal and submitted as under :

7.1. The appeal is not maintainable, as the order of the learned Single Judge against the interlocutory order of the Tribunal must be treated as passed in exercise of the jurisdiction under Article 227 of the

Constitution.

7.2. The present appeal is against the decision of the learned Single Judge dismissing the petition against the interlocutory order and, therefore, also the appeal may not be entertained.

7.3. The appellant was only a bidder whose offer was not acceptable to the vendor–Trust for valid reasons. None of the beneficiaries or any member of the Parsi community has objected to the sale by the vendor–Trust in favour of the purchaser–Trust and, therefore, the appellant has no locus standi to contend whether the sale in question is in the interest of the trust or not.

7.4. When the purchaser–Trust is a duly registered Public Charitable Trust carrying on several charitable activities including running the educational institutions and medical institutions, the difference between the offer made by the appellant and the price paid by the purchaser–Trust is the notional amount which is going to be used for charitable activities. In the affidavit dated 17.1.2006 of Mr.Harish Dave, General Secretary of the purchaser – Trust it is stated that the sale deed itself makes the reference to the charitable purposes for which the land is going to be used. The affidavit further states as under :

“2. I submit that in addition to providing for

the temple, the trust proposes to provide for :

i. Dispensary-cum-Medical Centre ;
ii. Computer Training Centre ;
iii. Health Awareness and Ayurvedic Pharmacy Centre ;
iv. Study Classes for music and English speaking / Improvement ;
v. A centre for Tribal upliftment centre ;
vi. A centre for De-addiction campaign ;
vii. Anti-dowry Campaign Centre ;
viii. Literacy Drive Centre ;
ix. Women's wing : self reliance project.

3. I submit that respondent Trust has to provide for more than Rs.50.00 lacs from its fund and/or through its devotees for providing for the above activities.

4. I submit that to carry out the aforesaid objects, the trust has invested more than Rs.25,00,000/- through its devotees for making the property usable and providing compound wall, wire-fencing to protect encroachment."

7.5. Providing for a temple on the land in question is only one of the purposes for which the purchaser–Trust shall use the land but the land will be mainly used for the charitable activities enumerated hereinabove. Construction of a temple is envisaged only on a small portion of the land and

only to ensure that public donations are available more easily.

7.6. The purchaser–Trust has already invested Rs.25 lacs for making the property usable and for providing compound wall and to protect the property against encroachments. Over and above the aforesaid amount spent, the purchaser–Trust is going to spend more than Rs.50 lacs from its own funds or from the funds collected through the devotees for providing the above activities. The purchaser–Trust will thus be spending at least about Rs.75 lacs over and above the amount of Rs.42 lacs already paid to the vendor–Trust as the purchase price for the land in question. The purchaser–Trust is thus going to spend more than Rs.1.17 crores for charitable activities and, therefore, the notional difference between the offer made by the appellants and the actual purchase price paid by the purchaser–Trust cannot be viewed in isolation as the decisive consideration for striking down the order of the Charity Commissioner or for granting any interim stay against the implementation of the decision of the Joint Charity Commissioner which is already implemented by execution of the sale deed on 2.7.2005 and the registration thereof on 5.7.2005.

8. Having heard the learned Counsel for the parties, this Court is not required to decide the question about maintainability of the appeal. In the first place, the learned Single Judge has not

indicated whether his decision is rendered in exercise of the jurisdiction under Article 226 or 227 of the Constitution of India. Otherwise also we are inclined to dismiss the appeal on merits for the reasons that follow.

9. There is no dispute about the fact that the vendor–Trust has established the need for transferring the land in question on account of its non-use and inability of the trustees of the vendor–Trust to put the land to use for the purpose of after death ceremonies of members of the Parsi community and to protect the property from encroachments. The Joint Charity Commissioner was, therefore, certainly justified in considering the question under Section 36 of the Act whether to grant permission to the vendor–Trust.

10. The gravamen of the challenge made by the appellants against the decision of the Joint Charity Commissioner for the purpose of interim relief has been that there is substantial difference between the offer made by the appellants and the purchase price paid by the purchaser–Trust. The difference being is as much as Rs.58 lacs, the Tribunal ought to have stayed further implementation of the order of the Joint Charity Commissioner and ought to have restrained the purchaser–Trust from putting up any construction on the land in question.

11. When the vendor–Trust had received two

offers and was not inclined to sell the property to a party who intends to use the property for commercial activities and the vendor– Trust wanted to sell the property to respondent no. 2 – Trust, the decision of the Bombay High Court in Arunodaya Prefab V. M.D.Kambli, reported in 1979 MLJ 104 would come into play at this stage. The Bombay High Court speaking through Hon'ble Mr.Justice SP Bharucha (as His Lordship then was) has held that under Section 36 of the Act the Charity Commissioner is concerned only with according or refusing the sanction of a particular sale which the trustees propose to make. To decide, whether the sale is in the interest of the trust, he is empowered to make such inquiry as he deems necessary. It is for the trustees to decide to whom they should sell the property, subject to sanction of the Charity Commissioner to the proposed sale. If the Charity Commissioner needs, before recording or refusing the sanction, to ascertain the market price of the property proposed to be sold, he may issue such directions as he thinks necessary and it is obligatory upon the trustees to comply with those directions.

But under Section 36, it is not open to the Charity Commissioner to compel the vendor– Trust to sell the property of the Trust to any person other than the person to whom the Trust is inclined to sell the property. All that the Charity Commissioner is required to consider, whether the proposed sale to a party to whom the Trustees of the vendor–Trust intend

to sell is adverse to the interest of the Trust. If the Charity Commissioner considers such sale to be adverse to the interest of the Trust, the Charity Commissioner can certainly decline to grant sanction.

12. In the present case, the Trustees of the vendor–Trust had produced the valuation report as well as the evidence in the form of Jantri prepared by the Stamp Valuation Department of the State Government to support its case that the estimated market value of the land in question was about Rs.42 lacs. The Joint Charity Commissioner accordingly recorded the finding to that effect and the question was once the purchaser–Trust was ready to pay such amount, the appellants had any right to contend that the property must be sold to them, because they were offering much higher price.

13. As held in Arunodaya Prefab (supra) the Charity Commissioner cannot compel the vendor-Trust to sell the property to a particular party merely because another party comes with much higher offer for purchasing the property for commercial activities. Of course, in such circumstances, in order to protect and advance the interest of the vendor-Trust, the Charity Commissioner may consider the following amongst other relevant factors:-

(i) the other Trust to whom the vendor–Trust proposes to sell the property has unimpeachable

credentials ;

(ii) the arrangement is not a facade for transfer of the property at undervaluation so that once the property passes on to the second Trust, the property is thereafter put to commercial use or any purpose other than a charitable purpose and ;

(iii) the purchaser–Trust satisfies the Court that besides paying the sale price of the property to the vendor–Trust, the purchaser-Trust is going to spend substantial amounts to suffer further detriment i.e., which would be in the region of the amount of the difference between the higher price the trust property were to fetch for commercial activity and the purchase price offered by the purchaser Trust for using the property for a charitable purpose.

14. In the facts of the present case, the trustees of the vendor–Trust have considered that offer of Rs.42 lakhs made by respondent no. 2 herein is reasonable offer considering the purposes for which the purchaser–trust is going to use the property which are charitable purposes like providing educational and medical facilities.

In the facts of the present case, the appellants have not challenged the credentials of the purchaser–Trust nor has it challenged the case of the

purchaser–Trust that it has been engaging in large number of charitable activities in various parts of the State and that the purchaser–Trust had also rendered yeoman services for providing relief to the victims of the earthquake in January, 2001. In the facts of the present case, therefore, there is nothing to doubt the credentials of the purchaser–Trust or the genuineness of the transaction of the property in question by way of sale from the vendor–Trust to the purchaser–Trust, nor is there anything to doubt the assurance given by the purchaser Trust to spend more than Rs.75 lakhs exclusive of the purchase price already paid for the land (but inclusive of Rs.25 lakhs spent so far).

15. At this stage, however, Mr.Joshi for the appellants has vehemently submitted that the aforesaid considerations may be relevant for deciding the application of the vendor–Trust under Section 55 of the Act regarding change of purpose on account of failure of the object of the Trust for using the property as Parsi Agiari and Dokhma in view of number of Parsi families having dwindled to as few as only three Parsi families in the village but it would amount to the Charity Commissioner granting sanction to the sale in question and also exercising the powers of the Court under Section 55 of the Act and permitting the vendor–Trust to change the object of the vendor–Trust without any order of the Civil Court, which alone has jurisdiction to permit such change of user. It is submitted that the sanction

granted by the Charity Commissioner under Section 36 of the Act would, therefore, for all practical purposes, amount to the Charity Commissioner granting permission under Section 55 of the Act for change of use insofar as the amount of Rs.58 lakhs is concerned, because that is the difference which the property is capable for fetching upon the sale to the appellants.

16. Although the argument, prima facie, appears to be attractive, it is premature at this stage. In the first place, the Charity Commissioner has already imposed condition while granting sanction under Section 36 that if the vendor–Trust does not have any other object, the vendor–Trust shall make an application before the competent authority and the Court under Section 55 of the Act for making appropriate use of the sale proceeds i.e., of Rs.42 lakhs. Hence, the question of applying Section 55 would arise in respect of the said sale proceeds of Rs.42 lakhs. As far as the notional amount of Rs.58 lakhs is concerned, that is really speaking not the additional sale price of the land in question but that is the additional value which the appellants have placed on the property in question over and above the market value of the property as assessed by the valuer, looking to the potential commercial use of the land, if at all it were to be put to commercial use. While ordinarily a public Trust may be expected to realize maximum consideration for its property, when the trustees of the vendor–Trust,

Charity Commissioner, Gujarat Revenue Tribunal as well as this Court are satisfied that the property is going to be put to use for charitable purposes only, it cannot be said that the offer made by the appellants must be taken as the market value of the land. Assuming that the sanction granted by the Charity Commissioner for the sale in question would amount to change of object of the Trust and assuming that the objects of the vendor–Trust were only religious objects (as urged on behalf of the appellants), considering that all religions consider that “service to humanity is service to God” and that no person from the Parsi community has objected to the sale of the property to the purchaser trust for Rs.42,11,111/-, there would not be any illegality or impropriety in permitting the sale of the land to the purchaser – Trust which is going to use the property for charitable purposes and for which the purchaser–Trust is going to spend another at least Rs.75 lakhs over and above the amount of Rs.42 lakhs already paid for purchasing the land in question. We may also make it clear that while the Court will not permit a trust to convert its objects from charitable activities to religious activities, the Court need not be so reluctant while considering the request of the trustees to convert its objects from religious activities to charitable activities.

17. As regards the decision of the Apex Court in AIR 1965 SC 1611, that was a case where the Apex Court was concerned with the question whether

offering meals on religious occasions called Swami Vatsal was a religious activity or a charitable activity. The Court considered it to be a religious activity and held that such activity must continue in keeping with the objects of the Trust. We do not see how this decision advances the case of the appellants who were merely parties who had made an offer for purchasing the property of a public Trust and the Charity Commissioner has not directed the vendor–Trust to accept the offer of the appellants.

18. As regards the principles laid down by this Court in 1993(1) GLH 473 and 1999(1) GLH 854, the said decisions only lay down the broad tests which are to be applied when the Charity Commissioner exercises the powers under Section 36 of the Act. Ultimately, the whole question turns on whether the proposed sale is adverse to the interest of the vendor–Trust or whether it advances the objects of the vendor–Trust. As already discussed above, the Court does not consider the sale in question to the purchaser–Trust as adverse to the interest of the vendor–Trust.

19. The learned counsel for the appellants vehemently submitted that the Charity Commissioner as well as the Court are bound to see that the objects of the Trust are fulfilled and that even in case of failure of the original intention of the settlor, the Charity Commissioner and the Court are bound to consider as to what would be the closest to the

settlor's intention.

Since the vendor-trust has already obtained Rs.42 lakhs which is considered to be the fair market value of the property in question, it will be open to the trustees of the vendor–Trust to consider applying the said funds for achieving the objects of the Trust and in case all the objects have failed, then to make a proper application under Section 55 of the Act as already directed by the Charity Commissioner in Condition no. 3 of the sanction order dated 30.6.2005.

20. In the facts of the present case, the vendor – Trust has already executed the registered sale deed in favour of the purchaser–Trust in the first week of July, 2005 and the purchaser–Trust has already paid the full consideration of Rs.42,11,111/- to the vendor–Trust. The order of the Joint Charity Commissioner has, therefore, already been implemented and acted upon. There is, therefore, no question of granting any interim stay against the operation or implementation of the order of the Joint Charity Commissioner. The respondent has already invested Rs.25 lakhs for putting up the compound wall and for taking other preliminary steps for putting the land in question to use and the purchaser–Trust, which is admittedly a public charitable Trust, proposes to spend another Rs.50 lakhs for putting the property to use for the following charitable purposes :

i. Dispensary-cum-Medical Centre ;

ii. Computer Training Centre ;

iii. Health Awareness and Ayurvedic Pharmacy Centre ;

iv. Study Classes for music and English speaking / Improvement ;

v. A centre for Tribal upliftment centre ;

vi. A centre for De-addiction campaign ;

vii. Anti-dowry Campaign Centre ;

viii. Literacy Drive Centre ;

ix. Women's wing : self reliance project.

In view of the above, the balance of convenience is also in favour of the purchaser–Trust and the public at large.

21. In view of the above discussion, we are of the view that the Gujarat Revenue Tribunal was justified in refusing to grant interim stay as prayed for. Of course, at the time when the appeal reaches final hearing before the Tribunal after passage of some time, the Tribunal will examine whether the property has been put to use for the above charitable purposes which are indicated in the affidavit-in-reply dated 17.1.2006 and which are reproduced hereinabove.

22. In view of the above discussion, the appeal is dismissed.

23. Since the appeal is dismissed, the Civil

Application for stay does not survive and is also dismissed.

(M.S.SHAH, J)

(SHARAD D DAVE, J)

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